IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-922

BANKERS TRUST COMPANY, ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

On Petition for Writ of Certiorari to the United States Court of Claims

PETITIONERS' REPLY MEMORANDUM

Petitioners submit the following in reply to Respondent's Memorandum in Opposition:

1. Respondent argues that the February 19 agreement was merely "preliminary" and "conditional" and that the settlement produced "nothing of substance" (Memo. 3) until ratified by the shareholders. In fact the February agreement was recognized by both sides as the final settlement of the long Reserve-Mesabi dispute. Because of the Mesabi negotiators' contacts with the Mesabi shareholders, both Reserve and Mesabi knew that once the settlement was agreed by the Boards of Directors, Mesabi shareholder ap-

proval was certain (App. 31a-33a). Prior to the shareholder vote the parties announced the settlement terms, the proposed transformation of Mesabi into a trust, Reserve's expansion plans, and quadrupled earnings projections for Mesabi. As a result, the price of Mesabi stock doubled. Only in a world of unrealistic abstractions is all this "nothing of substance."

2. The discussion in Respondent's memorandum (Memo. 4-5) of *Herbert J. Investment Co.*, 360 F. Supp. 825 (E.D. Wis. 1973) affirmed per curiam, 500 F.2d 44 (7th Cir. 1974), barely acknowledges that decision's approval of an early valuation date "despite the existence of future contingencies." Respondent attempts to distinguish that case on the ground that the court there used the date at which "temporary control was assumed by the purchaser." (Memo. 4) *Herbert J. Investment* involved transfer of a going business. In such a situation, an immediate transfer when the last practical obstacle—interim ICC approval—was cleared was appropriate to assure preservation of the business goodwill. Here Reserve had undertaken to transfer the Mesabi shares free of encumbrances (Pet. App. 54a) and an immediate transfer of the share certificates was wholly unnecessary.

The relevance of *Herbert J. Investment* to this case is the reasoning behind the choice of the earlier date for fixing value despite the fact that formal closing was deferred pending final ICC approval:

> "The parties recognized the importance of final [ICC] approval, but were so certain of its forthcoming that they fully committed themselves to the impact of their agreement [on the earlier date] and treated the possible failure of final approval as a real, but highly unlikely, condition subsequent." 360 F. Supp. at 827.

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In the present case the parties "fully committed themselves to the impact of their agreement" when the agreement was reached. And the parties could be confident that the remaining contingency could be ignored since it involved only an affirmative vote of stockholders (many of whom had already indicated their approval), as contrasted to approval by an independent government agency.

3. In 1960 the Mesabi management was advised by Delaware counsel that stockholder approval of the settlement was not required by Delaware law. (Tr. 71) Contrary to Respondent's suggestion (Memo. 6), that conclusion was correct. For dismissal of a derivative action, the Delaware rules required only shareholder notice and approval by the court, not approval by shareholders. Del. R. Civ. P. 23(c); *Perrine* v. *Pennroad Corp.*, 47 A.2d 479, 486 (Del. 1946), cert. denied, 329 U.S. 808 (1947). Nor did section 271 of the Delaware Corporation Law, which related to sales and leases of all of a corporation's property, mean that stockholder approval was legally required for the agreement with Reserve, which merely modified the royalty under an existing lease.[1]

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[1] The 1939 resolution authorizing the leases to Reserve gave Mesabi officers broad powers to make such further agreements "as in their judgment . . . may be necessary, advisable or proper in order to carry out the terms of [the 1939 agreements] according to the intent and purpose of these resolutions." [Stip. Ex. 4] Pursuant to that power and their general authority, Mesabi officers had, in February 1956, entered into an agreement settling some disputes with Reserve. [Pet. App. 40a-41a] The officers' authority to manage the leases and settle disputes without express shareholder approval, exercised in the 1956 settlement, covered the 1960 settlement. *Cf. Clarke Memorial College* v. *Monaghan Land Co.*, 257 A.2d 234 (Del. Ch. 1969); *Robinson* v. *Pittsburgh Oil Refg. Corp.*, 126 A. 46 (Del. Ch. 1924).

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4. *Davis* v. *United States*, 370 U.S. 65 (1962), does not, as Respondent suggests (Memo. 7) stand for the rule that property is valued as of the date of transfer, but for the common sense rule that the values of properties exchanged in a transaction "are either equal in fact or are presumed to be equal." 370 U.S. at 72. Petitioners maintain that logic requires that such equality be measured as of the time the parties agree, not two months later.

5. Respondent opposes the application of this Court's "enhancement principle"—which holds that the very event which requires that a value be determined must not be permitted to affect value—on the ground that the rule applies only in condemnation cases. But Respondent ignores this Court's teaching that the same valuation principles apply in both tax and condemnation cases. *Great Northern Ry. Co.* v. *Weeks*, 297 U.S. 135, 139 (1936).

6. Finally, the Respondent airily dismisses the serious uncertainty which the Court of Claims' decision produces in assessing the economic and tax consequences of business transactions. The Memorandum suggests that had the parties wished to know the tax consequences of their agreement when they entered into it, they should have "agree[d] on a purchase price and provide[d] that it would be paid in 'x' shares of stock at the market price on the final date of agreement plus or minus a cash balance." (Memo. 9, quoting Pet. App. 14a) But here such a price agreement would have been a wholly different transaction from that to which the parties actually subscribed. Nothing in the Internal Revenue Code or the applicable court decisions suggests that it was ever the intention of

Congress to require taxpayers to use some particular form for a transaction if they wish to foresee the tax effects of their agreement.

Respectfully submitted,

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